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No. 06-5247

In the Supreme Court of the United States

JOHN FRANCIS FRY, PETITIONER

v.

CHERYL K. PLILER, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The United States will address the following question:

Whether the "substantial and injurious effect" harmless-error standard for constitutional trial errors adopted in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), for habeas proceedings under 28 U.S.C. 2254 applies regardless of whether the state appellate court recognized the constitutional error and reviewed it for harmlessness under *Chapman* v. *California*, 386 U.S. 18 (1967).

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INTEREST OF THE UNITED STATES

This case presents the question whether the harmless-error standard for constitutional trial errors set out in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), for habeas proceedings under 28 U.S.C. 2254 applies whether or not the state appellate courts recognized the constitutional error and reviewed it under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). Although this case arises from a habeas petition filed by a state prisoner pursuant to Section 2254, the question presented also arises in cases brought by federal prisoners pursuant to 28 U.S.C. 2255, when an intervening change in the law prompts a federal prisoner to raise in a Section 2255 motion a constitutional claim that was either not raised or found to be meritless on direct re-

view.[1] Because the question presented implicates the harmless-error standard applicable to constitutional trial errors asserted in Section 2255 proceedings, the United States has a substantial interest in its correct resolution.

STATEMENT

1. In the early morning of October 27, 1992, the bodies of James and Cynthia Bell were discovered in a vehicle parked on the shoulder of Interstate 505 in northern California. Cynthia, who was seated on the driver's side, had been shot in the head. James, who was seated in the front passenger seat, had been shot eight times in his head, chest, back and wrist. J.A. 26-27. At least four witnesses saw an older-model pickup truck with a light-colored camper shell parked at the crime scene next to the victim's car during the evening of October 26, 1992. J.A. 28. Petitioner was charged with the murders. After his first two trials ended in hung juries, petitioner was convicted of both murders at his third jury trial and sentenced to life imprisonment without the possibility of parole. J.A. 67-68.

Numerous witnesses testified at petitioner's trial that Cynthia owed petitioner money for drugs, and that petitioner had been angered when he caught her roaming about his house, because he believed she was trying

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[1] See, *e.g.*, *United States* v. *Dago*, 441 F.3d 1238, 1245-1246 (10th Cir. 2006); *United States* v. *Owen*, 407 F.3d 222, 229 (4th Cir. 2005), cert. denied, 126 S. Ct. 1026 (2006); *United States* v. *Rivera*, 347 F.3d 850, 852 (10th Cir. 2003), cert. denied, 540 U.S. 1210 (2004); *United States* v. *Montalvo*, 331 F.3d 1052, 1057-1058 (9th Cir. 2003), cert. denied, 541 U.S. 1011 (2004); *Ross* v. *United States*, 289 F.3d 677, 682 (11th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1113 (2003); *Santana-Madera* v. *United States*, 260 F.3d 133, 140 (2d Cir. 2001), cert. denied, 534 U.S. 1083 (2002); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000).

to steal from him. At least three witnesses testified that they heard petitioner threaten to kill Cynthia in the days immediately preceding the murders. Several witnesses, including petitioner's brother, testified that when petitioner returned home on the night of the murders, he was spotted with blood. Petitioner's handgun also had blood on it and contained four spent shells.[2] That same night, petitioner made incriminating statements to his brother and several other witnesses, saying he "did" Cynthia and James Bell and describing in vivid detail the impact of a .357 magnum bullet on a human head. Expert testimony established that one of the bullets recovered from the victims had definitely been fired from petitioner's gun. When the police attempted to take petitioner into custody, he fled from the police in a high-speed chase. He confessed to another inmate that he had committed the murders, and tried to arrange to have his brother injured in order to persuade him to change his testimony. J.A. 71.

Petitioner testified at trial. While denying that he committed the murders, petitioner admitted that at the time of the murders he owned a 1977 powder blue pickup truck with a white camper shell and a .357 magnum. He admitted that Cynthia Bell dealt drugs for him and owed him money at the time she was murdered. Petitioner further admitted driving an acquaintance—who had testified that petitioner believed she (the acquaintance) had stolen money from him and had threatened to kill her (J.A. 29)—into the country two days before the murders, taking out his gun and shooting it twice out the window.

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[2] The State also presented testimony that petitioner sat in his truck for some time before entering the house and that once he came inside, petitioner went into the bathroom, from which the sound of running water was heard. J.A. 37.

He admitted that when he arrived home on the night of the murders, he "pulled into the driveway and sat there for a while," "trying to maintain control" and "get a focus." J.A. 53. Petitioner admitted going into the bathroom upon entering the house, but denied changing his clothes or having blood on them. He admitted that he removed the camper shell from his pickup truck the morning after the murders, but claimed that he did so to save gas mileage. Petitioner also admitted lying to the police when asked when he had last seen his .357. Finally, while petitioner did not admit that he had arranged to have an inmate harm his brother, petitioner admitted that he gave the inmate his brother's address. J.A. 49-55.

2. At trial, petitioner sought to establish that one or more other individuals committed the murders, including Anthony Hurtz. He introduced evidence that Hurtz had admitted his involvement to several witnesses. See J.A. 61-64. The trial court excluded the testimony of an additional witness, Pamela Maples, that she overheard Hurtz state that he committed murders that resembled the circumstances of the murder of the Bells. J.A. 17.

Maples testified at trial that, while at her sister's house in Vallejo in April 1994, she "overheard" Hurtz discussing some homicides. The prosecution objected to the testimony, and the defense made an offer of proof. Maples testified outside the presence of the jury that, during a conversation among her sister, Hurtz, and "a guy named Steve," she heard Hurtz state that he had killed a man and a woman in a car. Maples was "in and out of the room" at the time, only heard "bits and pieces" of the conversation, and did not participate in it. The conversation was already underway when she came in, and she did not know how long the participants dis-

cussed the murders, the context of the discussion, or whether the discussion was "serious" or not. Maples testified that Hurtz said that he shot the girl in the head first and then reached over and shot the guy. Hurtz said the victims were in a parking place, but he did not describe either the location of the murders or the type of car the victims were in. Maples further testified that Hurtz stated that he was "full of blood" after the murders, and that he ran through a field, threw mud on himself, and phoned someone to pick him up. Maples did not hear Hurtz state when the murders took place. Under cross-examination, Maples acknowledged that she had no idea whether the murders about which Hurtz spoke took place one week or ten years before the conversation, or whether they occurred in California or elsewhere. The trial court sustained the State's objection to this testimony, concluding that the defense had provided insufficient evidence to connect the incident described by Hurtz to the murder of the Bells. J.A. 7-17, 94-95.

3. Petitioner took an appeal to the California Court of Appeals, contending, among other things, that the exclusion of Maples's testimony violated his constitutional right to present a defense and to a fair trial. The court of appeals concluded that the trial court did not abuse its discretion in excluding the testimony. The court explained that, "[g]iven the absence of any actual linkage to the charged offenses, or any other evidence supporting an inference that the killings allegedly described by Hurtz were those of Cynthia and James Bell, Maples' testimony simply did not tend to show [petitioner's] innocence." J.A. 97. The court added that "no possible prejudice" could have resulted from the exclusion of the evidence because Maples's testimony was "cumulative" of the testimony of other defense witnesses

that Hurtz had confessed to shooting two unidentified people at close range while the victims were seated in a parked car. J.A. 97 n.17. In finding that the exclusion of the testimony was nonprejudicial, the court did not specify the harmless-error standard it was applying. Thereafter, petitioner filed a petition for review in the Supreme Court of California, which was denied. J.A. 113. Petitioner did not file a petition for a writ of certiorari seeking direct review of his conviction.

4. Petitioner moved in the United States District Court for the Eastern District of California for a writ of habeas corpus under 28 U.S.C. 2254. J.A. 114. He raised several issues, including the exclusion of Maples's testimony at his trial. The magistrate judge concluded that the exclusion of Maples's testimony violated the Sixth and Fourteenth Amendments because "the evidence of third-party culpability . . . . was sufficiently 'crucial or reliable' to outweigh the state's interest in exclusion of untrustworthy evidence." J.A. 180 (citing *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Washington* v. *Texas*, 388 U.S. 14 (1967)). The magistrate judge explained that, "[a]lthough the offer of proof regarding Maples is in parts imprecise, certain significant points match or closely parallel some of the key circumstances of the case at issue"—to wit, "[b]oth victims had been shot to death; victim Cynthia Bell had been shot in the head; the victims were in a car, parked in a turnout area; evidence showed she was in the driver's seat and James Bell was in the passenger seat and that the shooter was standing outside the vehicle's driver side; testimony revealed that the shooter would have been covered in blood." J.A. 179. The magistrate judge also took issue with the state appellate court's statement that no other evidence supported the inference that Hurtz had described the mur-

der of the Bells, observing that seven other witnesses "specifically link[ed] Hurtz to the deaths of the Bells." *Ibid.* The magistrate judge held that "[f]or the state appellate court not to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court." J.A. 180.

The magistrate judge then addressed whether the constitutional error was harmless. J.A. 180-182. The magistrate judge concluded that the error was harmless under the standard set forth in *Brecht* v. *Abrahamson*, 507 U.S. 619, 623 (1993), under which an error is deemed harmful if it "had substantial and injurious effect or influence in determining the jury's verdict." See J.A. 180 (quoting *Brecht*). Although the magistrate judge did not agree with the state appellate court that "no possible prejudice" could have resulted from the exclusion of Maples's testimony, he found that there had been an "insufficient showing" that the exclusion of the testimony had a "substantial and injurious effect" on the verdict. J.A. 181-182. The magistrate judge explained that the jury heard other defense witnesses implicate Hurtz in the murders in "far more damning detail" and that Maples's testimony "could not have emerged completely unscathed by a cross-examination that would have pointed up [its] infirmities." J.A. 181. Having thus found the constitutional error to be harmless, the magistrate judge recommended that habeas relief be denied. J.A. 182.

The district court conducted a de novo review of the case, adopted the findings and recommendations of the magistrate judge, and denied the habeas petition. J.A. 208-209.

5. Petitioner took an appeal to the Ninth Circuit. That court agreed with the district court that the exclu-

sion of Maples's testimony entailed an unreasonable application of clearly established federal law because the testimony was "material and would have substantially bolstered [petitioner's] claims of innocence." J.A. 212 (quoting *Chia* v. *Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004)). The court, however, also agreed with the district court that the error was harmless under the *Brecht* standard. *Ibid.* The court rejected petitioner's claim that the *Brecht* harmless-error standard was inapplicable because the state appellate court had "failed to conduct a meaningful prejudice review." J.A. 212 n.3. The court explained that, under its decisions, "the *Brecht* standard applies uniformly in all Federal habeas corpus cases under § 2254 regardless of the error standard, if any, applied by the state court." *Ibid.* (citing *Bains* v. *Cambra*, 204 F.3d 964, 976 (9th Cir.), cert. denied, 531 U.S. 1037 (2000), and *Inthavong* v. *LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005), cert. denied, 126 S. Ct. 1660 (2006)).

Judge Rawlinson dissented. J.A. 213-214. Applying the *Brecht* standard, Judge Rawlinson concluded that the exclusion of Maples's testimony was not harmless. J.A. 214.

SUMMARY OF ARGUMENT

Harmless-error review under the standard set out in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), applies in a federal habeas proceeding under 28 U.S.C. 2254 whenever the court finds a constitutional trial error, regardless of whether the state appellate courts reviewed that error under the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). *Brecht* adopted the less onerous harmless-error standard of *Kotteakos* v. *United States*, 328 U.S. 750 (1946), for federal constitutional trial errors asserted in habeas proceedings under 28

U.S.C. 2254 because of concerns about finality and federalism. The scope and rationale of the Court's opinion justify the application of the *Brecht* standard across the board.

Petitioner contends that *Brecht*'s scope is limited to cases in which the state appellate court had found (as the Wisconsin Supreme Court had in *Brecht*) the constitutional error to be harmless beyond a reasonable doubt under *Chapman*. Petitioner's contention lacks merit.

First, the majority opinion in *Brecht* made clear that it found the *Chapman* standard unsuitable for collateral review for a number of reasons, none of which related to the content of the state appellate court's legal determinations. The Court mentioned only one possible exception to its "hold[ing] that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type," 507 U.S. at 638 (footnote omitted), and that potential exception (for intentional errors) does not turn on the nature of the state courts' appellate review and is far more narrow than the one for which petitioner advocates.

Second, all the reasons the *Brecht* Court identified for rejecting *Chapman* on collateral review apply with the same force to cases in which the state courts on direct appeal did not conduct *Chapman* review. The *Brecht* Court first cited the States' interest in the finality of their criminal judgments. That interest arises regardless of the precise content of the state appellate courts' legal determinations in upholding the conviction. The *Brecht* Court next cited the intrusion federal habeas review visits on "the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." 507 U.S. at 635 (quoting *Engle* v. *Isaac*,

456 U.S. 107, 128 (1982)). The federal habeas courts' infringement on state sovereignty is no less severe in cases in which the state courts found no federal constitutional error. The *Brecht* Court also cited the historic purpose of the writ to provide relief only to those prisoners "grievously wronged." *Id.* at 637. A state prisoner is no more or less "wronged" by a state court decision erroneously finding no constitutional error than he is by a state court decision erroneously determining that the error was harmless. Finally, the Court cited the "social costs" of granting habeas relief, *ibid.*, pointing out, among other things, the difficulties in retrying defendants many years after the case was brought. Those costs do not vary based on the reason the state courts denied relief.

Petitioner's proposed approach not only finds no support in *Brecht*, but it would also produce inequitable results. Similarly situated prisoners whose constitutional rights were violated should not face different outcomes in a Section 2254 proceeding as a result of the state appellate courts making different errors in their cases, one with respect to whether there was a constitutional error at all, and the other with respect to whether the error was harmless under *Chapman*. Petitioner's approach would also be difficult to administer in practice, because a state court will often not make clear what harmless-error standard it is applying. This case itself—in which the state appellate court found "no possible prejudice" (J.A. 97 n.17)—illustrates that point.

Because the court of appeals here correctly applied *Brecht* rather than *Chapman* and correctly concluded that the error in excluding Maples's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict," 507 U.S. at 623 (quoting

Kotteakos v. *United States*, 328 U.S. 750, 776 (1946)), its judgment should be affirmed.

ARGUMENT

A STATE PRISONER IN A HABEAS PROCEEDING UNDER 28 U.S.C. 2254 MAY NOT OBTAIN RELIEF FOR A CONSTITUTIONAL TRIAL ERROR UNLESS IT HAD A SUBSTANTIAL AND INJURIOUS EFFECT ON THE JURY'S VERDICT

In *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), this Court held that a state prisoner seeking a writ of habeas corpus under 28 U.S.C. 2254 cannot obtain relief on the basis of a federal constitutional trial error unless that error "had substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 631 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)). In adopting the *Kotteakos* standard, which the Court had established for review of non-constitutional errors on direct appeal from federal convictions, see *id.* at 764-765, the *Brecht* Court expressly rejected applying the harmless-error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), under which a constitutional trial error triggers reversal of a conviction on direct appeal unless the error "was harmless beyond a reasonable doubt," *id.* at 24. The *Brecht* Court chose the "less onerous" *Kotteakos* standard because "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review." 507 U.S. at 636-637.

Following *Brecht*'s teaching, the court of appeals here applied the *Kotteakos* standard and concluded that the constitutional error was harmless. J.A. 212. Petitioner contends (Br. 24-27) that the court of appeals erred in applying that standard because in *Brecht*, un-

like here, the state appellate court applied *Chapman* on direct review, and *Brecht*'s holding and rationale are limited to that circumstance. As we explain below, petitioner's contention lacks merit.

A. *Brecht* Is Not Limited To Habeas Cases In Which A State Court Applied *Chapman* Review On Direct Appeal

In *Brecht*, the Court addressed whether the Seventh Circuit on collateral review correctly applied the *Kotteakos* harmless-error standard rather than the *Chapman* harmless-error standard to the violation of the petitioner's due process right under *Doyle* v. *Ohio*, 426 U.S. 610 (1976), not to have his post-*Miranda*[3] silence used against him at his trial. In deciding that the Seventh Circuit was correct to apply the *Kotteakos* standard, the Court explained that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard for collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Brecht*, 507 U.S. at 637. The Court further explained that the "less onerous [*Kotteakos*] standard" was "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases." *Id.* at 637-638. Those observations prompted the Court to "hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.* at 638 (footnote omitted).

The categorical nature of the Court's observations and holding refutes petitioner's assertion (Pet. Br. 24-27) that the Court adopted a standard for collateral review of constitutional error that would apply only when

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[3] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

a state court on direct review recognized that error and reviewed it for harmlessness under *Chapman*'s standard. The *Brecht* Court held out the possibility that the *Kotteakos* standard might not apply "in an unusual case" in which "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict." 507 U.S. at 638 n.9. That potential exception does not aid petitioner, however, because it is focused on the conduct of the trial and does not turn on the nature of the state courts' appellate review. In addition, petitioner's proposed approach would limit *Brecht*'s application in a much more radical way that finds no support in the decision.

Petitioner cites for support (Pet. Br. 23) a single passage in *Brecht*:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

507 U.S. at 636 (citation omitted). That passage does not support petitioner's contention that *Brecht* applies only in cases in which a state court applied *Chapman* on direct review. The Court's observation about a state court's capacity to identify and evaluate constitutional errors is a general one that applies regardless of what

specific determinations a state court actually makes in any given case. Indeed, nothing in the passage suggests, let alone establishes, that a state court's application of *Chapman* is a *prerequisite* to application of the *Kotteakos* standard on federal collateral review. Rather, the point is that a federal court in a Section 2254 proceeding is not similarly situated to a state appellate court directly reviewing a state conviction and thus should not apply the harmless-error standard that the Constitution "*requires*" the state appellate court to apply, whether or not the state court in fact found any constitutional error or, if it did, explicitly applied *Chapman* in the particular case.

The categorical nature of the majority's holding is confirmed by all of the Justices who wrote separately. Neither Justice Stevens, who authored a concurring opinion, nor the dissenting Justices read the majority opinion to be limited to cases in which *Chapman* review was applied by the state courts. See *Brecht*, 507 U.S. at 643 (Stevens, J., concurring) (referring to the "*Kotteakos* standard that will now apply on collateral review" of state convictions); *id.* at 644 (White, J., dissenting) ("If * * * the state courts erroneously concluded that *no violation had occurred* or (as is the case here) that it was harmless beyond a reasonable doubt, * * * the majority would foreclose relief on federal habeas review" when the petitioner's conviction was "tainted by a constitutional violation that, while not harmless beyond a reasonable doubt, did not have 'substantial and injurious effect or influence in determining the jury's verdict.'" (emphasis added) (quoting *Kotteakos*, 328 U.S. at 776); *id.* at 651 (O'Connor, J., dissenting) (observing that, under the majority decision, *Chapman* "no longer applies to *any* trial error asserted on habeas").

Consistent with *Brecht*'s clear holding, the Court's subsequent decisions have applied *Brecht* categorically. This Court's decision in *Penry* v. *Johnson*, 532 U.S. 782 (2001), is illustrative, confirming that the *Brecht* standard applies even when a state court does not conduct *Chapman* review. In *Penry*, the Texas Court of Criminal Appeals had rejected on the merits the petitioner's Fifth Amendment claim that the admission of a psychiatrist's report violated his Fifth Amendment privilege against self-incrimination and thus had no occasion to conduct harmless-error review. Although the Court ruled first that the Texas court's rejection of the petitioner's Fifth Amendment claim was not "objectively unreasonable," *id.* at 795, under 28 U.S.C. 2254(d)(1), the Court held in the alternative that, assuming a Fifth Amendment violation, "that error would justify overturning [the petitioner's] sentence only if [he] could establish that the error 'had substantial and injurious effect or influence in determining the jury's verdict,'" *ibid.* (quoting *Brecht*, 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776)). The Court concluded that, under *Brecht*, it could not disturb the state court's rejection of the Fifth Amendment claim, because it had "considerable doubt" that admission of the report "had a 'substantial and injurious effect' on the verdict." *Penry*, 532 U.S. at 796 (quoting *Brecht*, 507 U.S. at 637). *Penry* thus makes clear that *Brecht* applies to cases in which the state appellate courts did not conduct *Chapman* review because they found no constitutional error.[4]

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[4] In *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam), the Court held that, in cases where the state courts have in fact found a constitutional error harmless, habeas relief may be obtained under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, only when the state court's "conclusion

Calderon v. *Coleman*, 525 U.S. 141, 143-146 (1998) (per curiam), also indicates that whether the state appellate court applied *Chapman* has no bearing on the applicability of the *Kotteakos* standard on collateral attack. There, the California Supreme Court found that a jury instruction violated *state* law but concluded that the error was not prejudicial, without specifying the harmless-error standard. *Id.* at 143; see *People* v. *Coleman*, 759 P.2d 1260, 1281-1282 (Cal. 1998). On habeas review, the Ninth Circuit held that the instructional error violated the *federal* Constitution and was not harmless under

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[that the error was harmless] was * * * objectively unreasonable." *Id.* at 18. Two circuits have read *Esparza* to implicitly reject *Brecht* in circumstances in which the state courts have concluded that the error was harmless. See *Eddleman* v. *McKee*, 471 F.3d 576, 583 (6th Cir. 2006) ("AEDPA replaced the *Brecht* standard with the standard of *Chapman* plus AEDPA deference when * * * a state court made a harmless-error determination."); *Gutierrez* v. *McGinnis*, 389 F.3d 300, 306 (2d Cir. 2004) ("The Supreme Court [in *Esparza*] implicitly rejected *Brecht* as the proper lens for examining the harmlessness of constitutional errors on collateral review, at least where the state explicitly adjudicated a federal claim on harmless error grounds."). *Esparza*, however, concluded that the state court's harmless-error decision was *not* "objectively unreasonable," 540 U.S. at 18, and the Court thus had no occasion to decide whether the *Brecht* test also had to be satisfied to warrant habeas relief. Other circuits have continued to require that a federal constitutional error meet the *Brecht* standard before granting habeas relief under AEDPA in cases where the state courts found the error harmless. See *Inthavong* v. *LaMarque*, 420 F.3d 1055, 1061 (9th Cir. 2005) ("[B]oth the *Brecht* and the AEDPA/*Esparza* tests must be satisfied with respect to harmless error before relief can be granted."), cert. denied, 126 S. Ct. 1660 (2006); *Jones* v. *Polk*, 401 F.3d 257, 264-266 (4th Cir. 2005) (finding that the state court unreasonably applied *Chapman* but that the error did not have a substantial and injurious effect on the jury's verdict). In all events, *Brecht* would continue to govern cases, like *Penry*, where the state courts did not reach the harmless-error issue and all proceedings under 28 U.S.C. 2255.

Boyde v. *California*, 494 U.S. 370, 380 (1990). This Court assumed that there was constitutional error and ruled that the Ninth Circuit erred in failing to apply *Brecht*'s "substantial and injurious effect" standard in determining whether that error was harmless. *Coleman*, 525 U.S. at 145. Without inquiring into whether the state court's application of harmless-error principles to the state law violation amounted to or substituted for harmless-error review of the analogous federal claim under the *Chapman* standard, the Court explained that "once the [Ninth Circuit] determined that the giving of the [jury] instruction was constitutional error, it was bound to apply the harmless-error analysis mandated by *Brecht*." *Id.* at 146.[5]

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[5] Similarly, in *O'Neal* v. *McAninch*, 513 U.S. 432 (1995), the Court applied the *Kotteakos* standard adopted in *Brecht*, even though the state appellate court, having found no constitutional error, did not apply *Chapman* review. See Resp. Br. at 4, *O'Neal*, *supra* (No. 93-7407) (noting that the state appeals court "reject[ed] [the] [p]etitioner's claims" and held "that the challenged instructions were in accord with Ohio law"). See also *Tuggle* v. *Netherland*, 516 U.S. 10, 15 (1995) (Scalia, J., concurring) (because the state appellate court failed to perform its task of "determining whether there was reasonable doubt as to whether the constitutional error contributed to the jury's decision, * * * a remand is appropriate to allow the Fourth Circuit to review the case under the harmless-error standard appropriate to collateral review," citing *Brecht*); *Duncan* v. *Henry*, 513 U.S. 364, 371-372 & n.1 (1995) (Stevens, J., dissenting) (stating, in a case in which the state court, on direct appeal, had applied a variant of the *Kotteakos* standard in reviewing a due process violation for harmless error, that "the *Brecht* standard would apply in the federal habeas proceeding"). The Court's more recent statements about *Brecht* reflect the same view. See *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) ("When the government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government

B. The *Brecht* Court's Rationale For Rejecting *Chapman*'s Standard Applies Regardless Of Whether The State Courts Found A Constitutional Violation Or Applied *Chapman*

The *Brecht* Court identified several reasons for requiring federal courts on collateral review to apply a harmless-error standard "less onerous" (507 U.S. at 637) than *Chapman*, and none of them turns on the state court having found a constitutional violation and then having found it harmless under *Chapman* on direct review. The *Brecht* Court rejected the petitioner's argument that applying the *Chapman* standard on collateral review was necessary to deter state courts from overlooking constitutional errors and prosecutors from committing them. The Court concluded that "the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review." 507 U.S. at 636.

First, the Court concluded that applying *Chapman* would "undermine[] the States' interest in finality." *Brecht*, 507 U.S. at 637. That finality interest is equally robust when the state appellate courts have concluded that the petitioner's trial was free of constitutional error as when they have found constitutional error but concluded that it was harmless under *Chapman*. In either case, the state courts have decided that the conviction should not be disturbed, and it is that ultimate decision, as opposed to a subsidiary appellate legal determination, that triggers the "presumption of finality" that "atta-

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to meet the more lenient *Kotteakos* standard.") (citing *Brecht*); *United States* v. *Vonn*, 535 U.S. 55, 63 (2002) (citing *Brecht* as "the variant of harmless-error review applicable on collateral attack").

ches to the conviction and sentence." *Id.* at 633. Thus, the cost that collateral review imposes on the State's interest in finality is as high in the context presented here as it was in *Brecht*.[6]

Second, the Court found that applying *Chapman* would "infringe[] upon [the States'] sovereignty over criminal matters." *Brecht*, 507 U.S. at 637. Petitioner contends (Pet. Br. 25) that the "comity concerns" that arise when a federal court repeats the approach taken by the state courts "do not exist" when the state courts fail to apply *Chapman*. State court determinations concerning the *federal* harmless-error standard do not lie any closer to the core of state sovereignty (or otherwise

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[6] The California Court of Appeals held in the alternative that, even assuming the exclusion of Maples's testimony was an abuse of discretion, "no possible prejudice could have occurred," because her testimony was "merely cumulative." J.A. 97 n.17. Thus, the state appellate court did conclude, in the alternative, that any error was harmless. Had the court invoked the *Chapman* standard, it is unclear whether petitioner would view this case as subject to *Brecht*. See J.A. 212 n.3. It also is unclear why, even under petitioner's approach, a state court should have to invoke *Chapman* expressly when the finding that it made—*i.e.*, "no possible prejudice"—is tantamount to a finding of harmlessness under *Chapman*'s phraseology "harmless beyond a reasonable doubt." 386 U.S. at 24. See *ibid.* (observing that "[t]here is little, if any, difference between [the harmless beyond a reasonable doubt standard and] our statement in *Fahy* v. *Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction'"). See, *e.g.*, *Richardson* v. *Bowersox*, 188 F.3d 973, 979 (8th Cir. 1999) (observing that Missouri Supreme Court's review of constitutional claim for prejudice and its conclusion that "the jury's verdict would have been no different if [the] out-of-court statement had been excluded" might qualify as *Chapman* review). Certainly, if the standard required by *Chapman* (or an even more defendant-protective standard) is, in fact, applied, it could be neither error nor a basis for rejecting *Brecht* for a court simply to omit a citation to *Chapman*.

implicate the State's comity interests) than any other application of federal law by state courts. Contrary to petitioner's suggestion, the States have a sovereign interest in protecting judgments of conviction obtained in their criminal courts, regardless of the specific determinations that their appellate courts may have made in upholding them. When the *Brecht* Court referred to the States' "sovereignty over criminal matters," 507 U.S. at 637, it meant the States' sovereign interest in protecting "final and presumptively correct *convictions*" for violations of state criminal law, *ibid.* (emphasis added), not some discrete state appellate legal determination concerning federal law. See *id.* at 635 ("Federal intrusions into state criminal *trials* frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.") (emphasis added) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)).

Third, the Court in *Brecht* observed that applying *Chapman* "is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has 'grievously wronged,'" *Brecht*, 507 U.S. at 637, because *Chapman* affords relief "merely because there is a reasonable possibility that trial error contributed to the verdict," *ibid.* (internal quotation marks omitted). In the *Brecht* Court's view, the "substantial and injurious effect" test better reflects the historical basis for awarding habeas relief because it requires "actual prejudice." *Ibid.* Here too, the likelihood of grievous wrong does not turn on whether the state appellate court found a constitutional error that was harmless under *Chapman* or no constitutional error at all. Grievous wrong can arise in either situation, but only *Brecht* and *Kotteakos*, not